Supreme Court, U.S.
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No. 93-1055

In the Supreme Court of the United States

OCTOBER TERM, 1993

LEONARD SHANE, PETITIONER

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER OF MERCURY SAVINGS AND LOAN ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's pension rights vested before the Resolution Trust Corporation terminated his right to receive them.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unpublished, but the decision is noted at 996 F.2d 1227 (Table). The order of the district court (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1993. A petition for rehearing was denied on August 30, 1993. Pet. App. C1. The petition for a writ of certiorari was filed on November 29, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves petitioner's claim for pension benefits connected with his service as chief executive officer of Mercury Savings & Loan Association from 1964 until 1990. He was still employed at the time the Resolution Trust Corporation became receiver of the institution on February 23, 1990. See Pet. 6-7, 9-10.

Petitioner's claim involves Mercury's Supplemental Executive Retirement Plan. Three provisions of that plan are relevant to petitioner's claim for benefits. First, the plan provided that, "[n]otwithstanding any of the other provisions of the plan, no benefit shall accrue or vest hereunder with respect to any executive or beneficiary until such benefit is in pay status." Pet. 6-7. Section 3 of the plan also stated that an individual would not be eligible to participate in the plan until he "(a) reaches Normal Retirement Age while employed by the Association and retires on or after such date; or (b) has voluntarily retired from the Association after reaching age 55 and completing at least 15 years of Service." Pet. App. A4-A5 (omitting emphasis added by court of appeals). Finally, Section 5(b) provided that benefits would commence "on the first month following the Participant's retirement." *Id.* at A5-A6.

2. Petitioner brought this action against the Resolution Trust Corporation as receiver (RTC) in the United States District Court for the Central District of California, seeking to recover benefits under the plan. The district court granted the RTC's motion for summary judgment in a brief order (Pet. App. B1-B3), explaining only that it had "found that there is no genuine issue as to any material fact." *Id.* at B2.

3. The court of appeals affirmed. Pet. App. A1-A6. The court stated that "[s]tripped to its essentials, this

case boils down to whether [petitioner]'s rights to the disputed benefits had vested prior to the RTC's termination of his contract" and held that "[u]nder the controlling language of the Plan, it [was] clear they did not." *Id.* at A3-A4. The court explained that benefits could not vest until they were in "pay status," and concluded that "it is clear that 'pay status' can only be understood as 'being paid.'" *Id.* at A4.

After reviewing the relevant provisions of the plan, the court concluded that "for [petitioner]'s benefits to have vested, he would have had to retire," Pet. App. A4, because "the Plan requires that the executive retire to receive payment," *id.* at A6. Because petitioner "had not retired at the time the RTC took over Mercury," his benefits had not vested and accordingly the RTC had authority to deny benefits to him. *Ibid.* (citing 12 C.F.R. 563.39).

ARGUMENT

1. Much of the petition (Pet. 16-26, 42-55) contends that the court of appeals erred because its decision deprived petitioner of benefits that had vested before the RTC terminated his rights to those benefits. The decision of the court of appeals, however, rested on its holding that petitioner's benefits had not in fact vested before that time, because petitioner had not satisfied all of the conditions for receiving them—specifically, the benefits were not yet in "pay status" because petitioner had not yet retired.

2. None of petitioner's arguments casts serious doubt on the court of appeals' conclusion that the plan makes retirement a condition of payment and of vesting, and that petitioner's failure to have retired therefore bars him from receiving benefits under the plan.

a. First, petitioner's argument (Pet. 27-38) that the district court erred in failing to consider extrinsic evidence regarding the meaning of the plan ignores the court's express conclusion that the language of the plan was not ambiguous. Compare, *e.g.*, *Pacific Gas & Electric Co.* v. *G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968) (discussed at Pet. 31-35) (parol evidence inadmissible unless offered "to prove a meaning to which the language of the instrument is reasonably susceptible"). For the reasons explained by the court of appeals, the plan is not reasonably susceptible to the interpretation offered by petitioner. In any event, the question whether there was ambiguity in the language of this particular retirement plan is not an issue that warrants review by this Court.

b. Second, petitioner argues (Pet. 39-41) that the lower court erred in ignoring genuine issues of material fact about his employment status after the seizure. Specifically, he contends that the RTC requested that he continue at Mercury for full pay for some period of time after the seizure. Whatever the merits of that contention, it does not undermine the undisputed facts on which the judgment below rested: Petitioner had not retired when the RTC took control of the institution and terminated his right to the benefits, and therefore his benefits had not vested at that time. The nature of his work for the institution after that time is not material to the analysis of the lower courts.

3. Petitioner also argues (Pet. 55-63) that the applicable regulations do not give the RTC the authority to terminate his benefits. The regulation on which the court of appeals relied requires any employment contract with a covered institution to permit the RTC to terminate the contract if the institution fails, subject to a provision that "[a]ny rights of the parties that have

already vested * * * shall not be affected by such action." 12 C.F.R. 563.39(b)(5). Petitioner argues that Section 563.39 does not authorize the RTC to terminate employee pension benefits, contending that 12 C.F.R. 563.47 is the provision that governs the RTC's termination of pension plans.[1]

That claim is meritless. Section 563.39 deals with the RTC's right to terminate individual employment contracts, and its structure suggests that the right granted by that provision carries with it the right to terminate an employee's ongoing right to receive unvested fringe benefits; otherwise the exception permitting vested benefits to continue would be surplusage.[2] Section 563.47, by contrast, deals with a different power, the RTC's power to terminate an entire pension plan. Termination of an entire plan, of course, would not necessarily result in termination of the employees' individual rights to receive benefits, because the trustee of the plan would remain obligated to distribute whatever funds were in the plan at the time of termination to pay vested benefits

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[1] It is difficult to discern the point of petitioner's reliance on 12 C.F.R. 563.47, because that provision, like Section 563.39, empowers the RTC to terminate the arrangements that it covers. The most important difference appears to be a requirement that the RTC give 60 days' notice before terminating an entire plan under Section 563.47, where Section 563.39 allows it to terminate individuals' claims to unvested benefits immediately.

[2] See *Modzelewski* v. *RTC*, No. 92-15670 (9th Cir. Jan. 20, 1994), slip op. 536-537 (rejecting the argument that Section 563.47 bars the RTC from terminating individual pension benefits immediately upon taking control of a failed institution and explaining that "[p]ensions and other deferred compensation arrangements are benefits of employment—not all that different from salaries and other fringe benefits. As such, they are subject to termination when the RTC takes over, except to the extent the right to receive them has become vested.").

covered by the plan.[3] Because this case involves a termination of petitioner's individual benefits, rather than a termination of an entire plan (cf. Pet. 10, noting that petitioner was the only employee whose claim for benefits under the plan was denied), the court of appeals properly concluded that Section 563.39—rather than Section 563.47—was the governing provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] See 29 U.S.C. 1103(c) (1988 & Supp. IV 1992) (assets of an ERISA plan "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan").